United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-2626

United States Court of Appeals
FOR THE SECOND CIRCUIT

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PLS

JORDAN INTERNATIONAL COMPANY,
Plaintiff-Appellant,

against

S.S. "PIRAN", her engines, boilers, etc.,

and

FEDERAL COMMERCE & NAVIGATION CO., LTD., and SPLOSNA PLOVBA,
Defendants-Appellees.

REPLY BRIEF OF PLAINTIFF-APPELLANT

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POINT I

Both "due diligence" and "seaworthiness" are legal standards. Upon appeal from a decision of a judge they are treated as questions of law, freely reviewable, and not entitled to the benefit of the "unless clearly erroneous" rule.

Issues involving negligence such as "due diligence" and "seaworthiness" (where there is a failure to use "due diligence" or to make a vessel "seaworthy") have long been treated on appeal in this Circuit as questions of law not entitled to the benefit of the "unless clearly erroneous" rule. *Continental Ins. Co.* v. *United States,* 195 F(2d) 527, 528; *Mamiye Bros.* v. *Barber,* 360 F(2d) 774, 776; *Common Carriage of Cargo,* by Longley, p. 62.

In *Great Atlantic & Pacific Tea Co.* v. *Brasileiro,* 159 F(2d) 661, 665, Judge Learned Hand said:

> "This runs counter to one of the findings of fact, so named; but a finding of negligence is not a finding of fact which must be 'clearly erroneous' to be subject to the review. It sets a standard of conduct, which while it is applicable only to the concrete situation, involves a choice between, and an appraisal of, two contrasted values—the needed precaution and the possible damage."

Judge Friendly, in his dissent, in *Shenker* v. *United States,* 322 F(2d) 622, 632, noted that:

> "We have consistently held that unseaworthiness, like negligence, is a question of law not within the scope of the 'unless clearly erroneous' rule or its admiralty equivalent (cases cited)."

In *General Motors Corp.* v. *The Olancho,* 115 F.Supp. 107, 114, affirmed 220 F(2d) 278, "unseaworthiness" was listed as a conclusion of law.

In *Philippine Sugar C. Agency* v. *Kokusai Kisen, etc.,* 106 F(2d) 32, 34, Judge Learned Hand held that:

> "The standard of seaworthiness, like so many other legal standards, must always be uncertain, for the law cannot fix in advance those precautions in hull and gear which will be necessary to meet the manifold dangers of the sea."

POINT II

Defendants claim that the entry of seawater into the No. 1 hold was not caused by unseaworthiness, but rather by a peril of the sea. Accordingly, defendants must prove both seaworthiness and a peril of the sea. This "Point" deals with the issue of seaworthiness.

The seaworthiness which the defendants must prove pertains *solely* to the No. 6 pontoon cover over the No. 1 hatch, at the time the vessel departed from Newport.

There is absolutely no proof in the trial record, as to the condition of the No. 6 pontoon cover at the time the vessel departed from Newport. This is a fatal defect in defendants' case.

The Trial Judge described the defendants' legal burden as follows:

> "Defendants claim that the entry of the water was not caused by unseaworthiness, but by a peril of the sea for which defendants are not liable under COGSA. Defendants have the burden of proving this proposition" (A6).*

Defendants have been asked during this appeal to simply demonstrate where there is *any* proof sufficient to establish that the No. 6 pontoon cover was seaworthy when the voyage commenced. Concededly, this is part of defendants' burden of proof.

At page 20 of our initial brief on appeal, we called upon defendants to detail in their answering briefs any evidence that they claim tends to sustain this narrow—but very important—element of essential proof. We added, "A

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* "A" references are to the pages in the Joint Appendix.

failure to do so will certainly be commented upon in plaintiff's reply brief".

We can be sure that if any such proof existed the defendants—particularly Splosna Plovba—would have triumphantly detailed it in their answering briefs. This they did not do. We, of course, made the challenge knowing that they would not be able to meet it.

Without referring to plaintiff's challenge that any alleged proof of the seaworthiness of the No. 6 pontoon at Newport be detailed in its answering brief, defendant Splosna Plovba makes references to the testimony of two witnesses, with the apparent hope of convincing this Court that it has sustained its acknowledged burden of proof as to seaworthiness. We shall now consider each of these two references separately.

(a) The answering brief, at page 12, quotes, as follows, from the deposition testimony of the boatswain, Rogelja Svonko, while he was speaking about his duties:

> "That before departure of the vessel to check whether all the hatches are properly closed and secured, that I check all the items on the deck, not only on the deck but also in other compartments whether it is tied and secured properly. That is basically it." (A111)

Nowhere does the boatswain state that he actually checked to see if all the hatches were properly closed and secured prior to departure of the vessel from Newport; in fact, he *did not* check to see if all the hatches were properly closed before the departure of the vessel, for the simple reason that it would have been impossible for him to have done so. The truth is that the vessel commenced its voyage from Newport at 0653 on January 31, 1968, dropping the harbor pilot at 0855. After that, in "rainy" weather, while the ship was "rolling and pitching heavily",

the vessel's log notes that, "The crew is clearing the deck and closing hatches" (A123). Why did the vessel leave in such haste?

Accordingly, the hatches were not closed until the vessel was at sea in bad weather for more than two hours. Therefore, it would have been impossible for boatswain, Svonko, to have checked, before departure, whether all the hatches were properly closed. At best, even if the boatswain had, in fact, performed his duty and checked before departure and found all the hatches properly closed, this would never have constituted proof that the No. 6 pontoon cover was actually seaworthy.

(b) The answering brief, at page 11, also refers to the testimony of a Lloyd's surveyor, Leendert O. Jonker. He first testified by deposition (Exhibit W), and then, apparently because his deposition was inadequate (see Trial Judge's comments, TM 507, 508),** he was flown over from The Netherlands during an Election Day hiatus in the trial.

Our initial brief on appeal went into great detail quoting from the testimony of Mr. Jonker. We established—by using his own words—that he did not know anything about the No. 6 pontoon cover on the No. 1 hatch. This testimony is all set forth on pages 17 and 18 of our intial brief, and will not be repeated here.

Significantly, Mr. Jonker did not know if the No. 6 pontoon cover, which collapsed at sea, was among those he saw in Rotterdam (A85, 86). In fact, he did not even know how many pontoon covers were on the vessel (A85). These pontoon covers are separate units. They are movable, interchangeable and replaceable. They can be piled on top of each other (A85; Picture No. 10 at E3).*** There is

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** TM references are to pages of Trial Minutes.

*** "E" references are to pages in Exhibit Volume.

absolutely no proof in the trial record to establish that the No. 6 pontoon cover, which collapsed at sea, was ever in Rotterdam.

It is clearly inadequate for any litigant to claim that it has established the seaworthiness of a movable, interchangeable and replaceable part, such as a pontoon cover of uncertain age, by offering testimony of a person who, in another country at another time, said that (while there is no reference to them in his seven year old survey report) he always checks hatch covers.

If, as Judge Learned Hand stated, "the warranty of seaworthiness is a favorite of the admiralty", *Metropolitan Coal Co.* v. *Howard,* 155 F(2d) 780, 783, that favoritism is ill-served by any palpably false insinuation that a boatswain checked to see if the hatches of the vessel were properly closed and secured before departure; or by the testimony of a surveyor, who states that, in another country at another time, he checked some unidentified, movable, interchangeable and replaceable parts—which may, or may not—have been on the voyage during which plaintiff's cargo was damaged.

* * *

As a final observation on the issue of the seaworthiness of the No. 6 pontoon cover over the No. 1 hatch, plaintiff has proved that the defendants failed to take advantage of an opportunity to have the "strength members" of the pontoon scientifically tested after the casualty.

Actually, the No. 6 pontoon cover was tested by the defendants in New Orleans. No notice that the test was going to be made was given to the cargo owners or their attorneys (TM 431). This in itself created an air of unfairness about the whole proceeding. *The Westchester* (2 Cir.), 254 Fed. 576, 578.

Not only was the secrecy of the test objectionable and inexplicable, but the failure of defendants to test the

struts, or strength members, of the pontoon cover, is only consistent with fear of what the result would be. It is just incredible that, anyone seriously interested in trying to determine the seaworthiness of a steel pontoon, would test the 32-hundredths of an inch thick top cover (TM 432; A7) and not the struts, or strength members. This strange conduct also seemed to worry the Trial Judge, because he said:

> "Now, I don't want to quibble, but it does seem to me, if there was going to be a test made, that any kind of analysis, why, probably something should have been done with those struts or strength members." (A74)

The logic of that statement cannot be faulted.

* * *

The importance of defendants' failure to prove the seaworthiness of the No. 6 pontoon cover on the No. 1 hatch, at the time the vessel departed from Newport, cannot be overestimated.

In POINT III we shall discuss the defendant's failure to prove a peril of the sea. However, even assuming for the sake of argument, that defendants could prove a peril of the sea, they must still be liable to the plaintiff if the No. 6 pontoon cover was not proved to be seaworthy at the time of the commencement of the voyage from Newport, unless they can prove "due diligence" to make it seaworthy. The defendants' failure to prove "due diligence" to make the vessel seaworthy will be discussed in POINT IV of this reply brief.

POINT III

The burden of proving a "peril of the sea" is on the defendants.

"Typical winter weather for the North Atlantic" does not constitute a "peril of the sea" during a February crossing of the North Atlantic.

Proof of a "peril of the sea" must be affirmative and clear. Conjecture will not suffice.

A theory about a phantom giant wave striking the vessel during the night does not meet the standard of proof required by the federal courts, in order to breach the warranty of seaworthiness.

It is conceded that the defendants have the burden of proving a peril of the sea. The Courts have repeatedly taken this position. *The Samland,* 7 F(2d) 155, 157; *The Saturnia* (2 Cir.), 226 F(2d) 147, 149. This proof cannot be based upon conjecture. *The Folmina,* 212 U.S. 354, 363. It must be affirmative and it must be clear. *The Samland* (*supra*); *The Saturnia* (*supra*); *Artemis Maritime Co.* v. *Southwestern Sugar & M. Co.,* 189 F(2d) 488, 491. A mere "theory" will not suffice. *The Lassell,* 53 F(2d) 687.

It is equally well-established that weather which is typical and expectable for the time and place, is not such weather as will constitute a peril of the sea. *The Vizcaya,* 63 F. Supp. 898, 900, aff'd 182 F(2d) 942, cert. den. 340 U.S. 877; *The Manuel Arnus,* 10 F. Supp. 729, 732, aff'd (2 Cir.) 80 F(2d) 1015; *Middle East Agency* v. *The John B. Waterman* (SDNY), 86 F. Supp. 487, 489.

We know for a fact, upon the very best authority, that the weather experienced by the "PIRAN" during its February crossing of the North Atlantic was "typical winter weather for the North Atlantic". That was the testimony of the vessel's Chief Mate, who was called as a witness

by the defendants (A32). It should be noted that the Chief Mate did not say that the night of February 8/9 was an exception to the typical winter weather. The Trial Judge recognized the importance of that testimony when he said:

> "Secondly, as far as the condition of the sea, the only live witness appearing was the chief mate and he said it was just what was expected in the North Atlantic at this time." (A74).

Captain Patterson, defendants' expert witness was asked the following questions about the "PIRAN'S" log (A123-133) and gave the indicated answers:

> "Q. Captain, did you also note the entry for the same date (February 8, 1968) 'Shipping sea all over the deck and hatches,' and I ask you, is that unusual for the month of February in the North Atlantic?
>
> "A. No.
>
> "Q. And finally this: 'The ship is pitching heavily and rolling'. And again I ask you is that unusual for the month of February in the North Atlantic?
>
> "A. No, sir, that is not.
>
> "Q. Did you at any point in the reading of the log book note any entry about confused seas?
>
> "A. No, I cannot recall having seen that.
>
> "Q. That is something you would enter as the captain of a vessel, wouldn't you?
>
> "A. I would, yes". (A65)

Faced with such testimony from their own witnesses, the defendants—if they were to have any chance of success—had to try to prove that at some time the "typical" winter weather in the North Atlantic was really not so "typical". Hence, the birth of the giant, phantom wave theory.

Now, presumably, if a giant, phantom wave—which no one on board the vessel heard, saw, or felt, nor bothered

to record in the log (nor was it recorded in any Department of Commerce report)—is to be the basis for a theory, it is best that such a phenomenon wreak its vengeance during the night.

Defendant, Splosna Plovba, in an effort to explain away the failure of anyone on board the "PIRAN" to be aware that they had been struck by a giant wave, states:

> "Considering the lack of visibility during hours of darkness, the pitching and rolling of the vessel as well as the No. 1 hatch being some 300 feet forward of the bridge the absence of any eyewitness testimony is totally understandable and certainly not conclusive". (Splosna Plovba's answering brief, page 7).

While the defendant has chosen only to try and explain away a failure to see a giant wave (ignoring the fact that breaking waves are white and that vessels at sea carry range lights that would highlight the whiteness) it is a certainty that the defendant desires the explanation to cover doubts as to why the alleged giant wave's nocturnal visit was not made known, in any fashion, to those on board.

One might be led to believe that the only man awake at night aboard the "PIRAN" was the helmsman. Actually, many must have been awake. "Lookouts", as well as a deck officer, helmsman, and an engineer must be awake.

The Supreme Court in *Chamberlain* v. *Ward,* 21 How. (62 U.S.) 548, 570, said:

> "Steamers navigating in the thoroughfares of commerce must have constant and vigilant lookouts stationed in proper places on the vessel, and charged with the duty for which lookouts are required, and they must be actually employed in the performance of the duty to which they are assigned".

"* * * the vigilance of the lookout ought to be proportionate to the danger." *The Saratoga,* 37 Fed. 119, 120.

"The denser the fog and the worse the weather the greater the cause for vigilance. * * * Great difficulty in seeing does not justify abandonment of efforts to see, but, on the contrary, requires the stationing of men 'to see if they can see'." *The Sagamore,* 247 Fed. 743, 755.

"Neither the captain nor the helmsman in the pilot-house can be considered to be 'lookouts' within the meaning of maritime law". *The Orion,* 26 F(2d) 603, 605.

"Proper lookouts are competent persons other than the master and helmsman, properly stationed for that purpose, on the forward part of the vessel; and the pilot-house in the night-time, especially if it is very dark, and the view obstructed, is not the proper place". *The Ottawa,* 3 Wall (70 U.S.) 268, 273.

Accordingly, it is a certainty that there must have been several vigilant men awake and on duty on the "PIRAN" during the night of February 8/9, 1968. It is incredible that no one would have seen, heard or felt a wave of the magnitude required to have broken a steel pontoon cover claimed to have been seaworthy.

* * *

Plaintiff, in its initial brief on appeal, pages 12 and 13, analyzed in great detail the testimony of Captain Patterson, the retired sea captain, who testified on behalf of defendants from weather charts published by the U. S. Department of Commerce (Exhibit P). It was established that no vessel reporting to the Department of Commerce is recorded as having been within one hundred miles of the "PIRAN", and that one was in a southesterly direction (A62). The next nearest vessel was 150 miles to the southwest (A62).

Defendant, Splosna Plovba, in its answering brief, page 6, is critical of our argument, which was supported

by the testimony, that no reporting vessel was within 100 miles of the "PIRAN". The defendant argues that, "The charts are prepared from numerous reports, but show only a limited selected number of reporting vessels because of space restriction". In fact, Captain Patterson had testified that there "probably" were other reports sent in (A66). Does the defendant argue that these "problematical" reports of an unknown nature are evidence against the plaintiff?

Actually our criticism of Captain Patterson's testimony, was not directed at him but rather at the limited information which was put at the disposal of a man who had never been on the "PIRAN", either at sea or in port. The whole point of his testimony was that the weather reports indicated a "peaking effect" from wave action (A59). We established, by reference to his testimony, that the "peaking" phenomenon depended upon four variables, only one of which was known to Captain Patterson (plaintiff's initial brief, pages 12 and 13). Hence, our rather logical argument, that any conclusion that the damage to the pontoon cover was caused by "peaking", was invalid. In addition, we pointed out that the invalidity of this conclusion was also noted by the Trial Judge, who said:

> "Now, Captain Patterson was a splendid, a fine witness as far as his theories. And he set the stage, and he did get some distance in proving this extraordinary weather. He proved the circumstances were there. But he actually, in response to my questions, presented a number of factors, a number of variables. And he didn't know the extent to which those variables existed or didn't exist, precisely, and that really prevented him obviously from proving with precision what happened." (A74, 75)

Instead of trying to refute, point by point, our argument, where we established that Captain Patterson's con-

clusion had to be invalid because he concededly only knew one of four necessary variables, the defendant, Splosna Plovba, can do no better than assert that we seek to "denigrate the objective evidence of the weather charts (Exhibit L), the weather reports (Exhibit K) and Captain Patterson's analysis and testimony" (Defendant Splosna Plovba's brief, page 7). The obvious weakness of that response is the best indication of the type of proof defendants offer to sustain their burden of proof concerning an alleged peril of the sea.

* * *

It should also be noted that Captain Patterson's theory of "peaking" waves—based on reports of vessels more than 100 miles away—includes speculation that the worst of the storm would have been at 0100 hours on February 9, 1968 (A59). Defendant, Splosna Plovba, in its brief, page 7, also claims that, "The vessel was in its most hazardous position at approximately 0100 hours on February 9th" (A59). Yet, the log of the vessel for the same date—written by men who were actually on the spot—reads:

> "After midnight, the wind and the sea from S-ly direction decreases rapidly." (A132)

We suggest, that in fairness to the plaintiff, and as a matter of law, there can only be one valid conclusion when the choice is between log entries written by men on the spot and a theory based upon four variables—only one of which is known to the theorist. That one, incidentally, was a wind force of 10, which, in the wintertime does not constitute a peril of the sea. *Edmond Weil, Inc.* v. *American West African Line* (2 Cir.), 147 F(2d) 363, 366.

* * *

Defendants claim that the ship was seriously damaged. Therefore, they argue, something very big, like a wave, must have hit it. One would think that the bigger the

"something", the greater the impact, making it inevitable that someone, of the many men who must have been awake on board the "PIRAN", would have seen, heard or felt that impact.

The claim of serious damage to the ship is contrary to the Master's entry in the log for February 9, 1968, when he wrote:

> "There were noted few minor damages on the deck." (A132)

In addition, the boatswain, defendants' witness, was asked the following question and gave the indicated answer:

> "Q. Did your vessel sustain any other damage than the collapse of the pontoon covers?
>
> "A. The flag mast on the bow I believe was broken, that was damaged." (Exhibit EC, p. 54).

During the trial testimony of the Chief Mate (his deposition had been taken beforehand) a defense attorney, in an effort to repudiate the log entry about "minor damages on deck" showed the witness fifteen pictures. After the witness finished his testimony the Trial Judge said:

> "I haven't seen any pictures showing serious setting down of the deck of the ship." (A34)

Defendants' attorney went on to say that two such pictures were "in the stack of 15" (A34). All of those pictures had been introduced into evidence during the testimony of the Chief Mate. When again shown the pictures the Trial Judge said:

> "You have got the flagpole broken, you have the bent rail in back of the forecastle, you have the bent pontoons, you have got the stanchions broken at the

top, those little stanchions under the mast house; you have got the bulkhead and the masthouse set in, and then Figures 12 and 13 show a girder under the deck with some slight deformation." (A34)

The Trial Judge then added:

"Do you have any pictures showing that deck really set in? This doesn't look to me like any deck set in.

"Mr. Ryan: Your Honor, there has been testimony on it." (A35)

The pontoon cover is a movable section of the deck. If the watertight integrity of the vessel is to be maintained it must be able to withstand the same sea forces as the rest of the deck. Only the No. 6 pontoon cover cracked during the voyage. When it fell into the 'tween deck the main deck area around the resulting hole was denied the structural support incident to a properly fitted and seaworthy steel pontoon cover. It would not be surprising if the condition of the surrounding area reflected the crash of the steel pontoon cover to which it was fastened. The "bulkhead and the masthouse" referred to by the Trial Judge should have read the "bulkhead of the masthouse", for that was the only bulkhead in the area. The masthouse is the ship's housing in front of which the loose 1,000-lb. fender, with the broken wire, had been stowed (See Exhibit 23A at E5). Naturally, the masthouse (which is not a structural part of the ship) and its bulkhead (front of the masthouse) were set in, when the fender impelled by the seas moved back and forth, striking the rear coaming of the No. 1 hatch on its forward motion and the front of the masthouse on its backward motion.

In short, every bit of damage to the ship noted by the Trial Judge is directly attributable to the crash of the steel pontoon and the flaying about of the loosely stowed 1,000-lb. fender.

The best indication that the damage to the vessel was relatively mild is the fact that the vessel continued on its voyage from Bridgeport to New Orleans—the port where the top of the pontoon cover—and not its strength members —was tested. There is no proof that the vessel's classification society (without whose certificates of seaworthiness the vessel could not sail) was ever called in at Bridgeport to determine if the damage to the vessel was serious. There is no proof that the vessel ever lost a single day of profit making because of the alleged serious damage.

In any event, proof of other damage, be it minor or substantial, is no substitute for the missing proof as to the seaworthy condition of the broken No. 6 pontoon cover at the time the vessel departed from Newport.

Exhibit 16 (at E4) is a picture of the damaged pontoon cover. It was taken on February 13, 1968, only four days after it collapsed at sea. Aside from the obvious damage, its rusty condition is significant. Rust, such as is clearly visible, could not have developed in such a short time on a seaworthy steel pontoon intended to withstand wave action in the North Atlantic.

The thrust of defendants' case seems to be that a very heavy object must have hit the No. 6 pontoon cover, and that heavy object must have been a giant wave. That conclusion does not follow the evidence and it does not follow logically. The damage found is consistent with typical over-the-deck waves striking an old and rusted, or a weak, or a defective pontoon cover, during a February crossing of the North Atlantic. Hence the significance of defendants' failure to prove the seaworthy condition of the No. 6 pontoon in Newport.

Defendants' argument, that while they have no direct evidence concerning a peril of the sea from those actually on board the "PIRAN", they have circumstantial evidence that something bad must have happened without the knowl-

edge of those on board, not only fails to recognize that the minor damage found was consistent with a defective pontoon cover and a poorly stowed 1,000-lb. fender, but it confuses circumstantial evidence with a failure of proof.

POINT IV

Under the facts of this case, the failure of the defendants to offer any evidence that the No. 6 pontoon cover on the No. 1 hatch was seaworthy when the "Piran" left Newport, of necessity results in a failure of the defendants to prove that they used "due diligence" to make the No. 6 pontoon cover seaworthy before the vessel left Newport.

The responsibility of a carrier to use due diligence to make a vessel seaworthy is either fulfilled, or not fulfilled, at the time the vessel "breaks ground" for the voyage in question. *The Steel Navigator* (2 Cir.) 23 F(2d) 590, 591; *Erie & St. Lawrence Corp.* v. *Barnes-Ames Co.*, 52 F(2d) 217, 218. Accordingly, only evidence that will prove due diligence at Newport, Wales, is relevant.

Defendants' inability to establish that the No. 6 pontoon cover was seaworthy when the vessel left Newport, was due, at least in part, to the fact that there is *no* evidence that it was checked for structural integrity in Newport—or for that matter, any place else. Indeed, there is a complete absence of information as to the past history of this movable pontoon cover. How old was it? Where did it come from? How long had it been on the "PIRAN"? No one seemed to know. Mr. Jonker, defendants' star witness, who was flown in from The Netherlands during the trial, was asked the following question, and gave the indicated answer:

> "Q. You have no way of knowing, do you, that the pontoons you examined in Rotterdam were the same

pontoons that were on the vessel when it left Newport, Wales, for the United States?

"A. No, sir." (A85, 86)

Accordingly, it became impossible for defendants to offer any evidence that they used due diligence to make the No. 6 pontoon cover seaworthy before the "PIRAN" started on her voyage. The very same absence of proof about the past history of the pontoon cover which actually collapsed, became the absence of any proof necessary to establish due diligence in regard to that same pontoon cover. This accounts for the failure of the defendants in their briefs to separately treat their burden to prove that the No. 6 pontoon cover was either seaworthy, or that due diligence was used to make it seaworthy. The failure of proof as to one was the failure of proof as to the other.

The United States Supreme Court in *The Southwark,* 191 U.S. 1, 15, said:

> "But whether fault can be affirmatively established in this respect it is not necessary to determine. The burden was upon the owner to show by making proper and reasonable tests that the vessel was seaworthy and in a fit condition to receive and transport the cargo undertaken to be carried, and if by the failure to adopt such tests and to furnish such proofs the question of the ship's efficiency is left in doubt, that doubt must be resolved against the ship owner and in favor of the shipper. In other words, the vessel owner has not sustained the burden cast upon him to establish the fact that he has used due diligence to furnish a seaworthy vessel, and, between him and the shipper, must bear the loss. *The Edwin I. Morrison,* 153 U.S. 199, 215; *The Phoenicia,* 90 Fed. Rep. 116."

In *Warner Sugar Refining Co.* v. *Munson S.S. Line,* 23 F(2d) 194, 197, aff'd (2 Cir.) 32 F(2d) 1021, the Court

said:

> "And a shipowner has not sustained the burden of exercising due diligence by a mere superficial inspection; nor where the inspection or the evidence is insufficient to support a finding of good condition, or that a diligent effort had been made to put her in good condition." (Cases cited)

Not only was there a failure to prove a mere visual, or superficial, inspection of the pontoon cover which collapsed before the voyage commenced in Newport, but there was a complete failure to prove that this particular pontoon cover, of uncertain age and condition, was ever inspected anywhere.

In plaintiff's initial brief, at page 30, we called upon the vessel owner "to set forth in detail just what evidence it claims supports its contention that it used due diligence in Newport to make the vessel seaworthy, in respect to the No. 6 pontoon and the stowage of the mooring fender, for the voyage from Newport to Bridgeport".

Our challenge remains unanswered. It remains unanswered for the simple reason that there is no evidence that the vessel owner used any due diligence in Newport to make the vessel seaworthy for a voyage from Newport to Bridgeport.

* * *

Replies to various comments in the answering brief of defendant, Splosna Plovba:

1. Defendant, Splosna Plovba, at pages 8 and 9 of its brief, questions our assertion that Captain Patterson referred to the following entry in the vessel's log for February 9, 1968:

> "There were noted few minor damages on the deck."

Captain Patterson had been asked:

"Q. Did you read, in preparing for your testimony, the logs of the Piran?
"A. Yes, I did." (TM 409)

Captain Patterson then had read to him the above quoted entry. It is certainly fair to state that Captain Patterson had referred to a log entry, if he had read the log before testifying.

2. Defendant, Splosna Plovba, at pages 11 and 12 of its brief, claims that plaintiff's "assertion (at page 19) that the District Court 'poorly received' Mr. Jonker's testimony is rendered completely out of context". Actually, the statement of the Trial Judge was said by plaintiff to be applicable to the Rotterdam inspections (Plaintiff's initial brief, page 19). In fact, that is just what the Trial Judge referred to (A33).

Far from being out of context the quotation we used was shortly followed by this statement from the Trial Judge:

> "So I don't know what we are doing with Rotterdam records when the great mystery, is what happened at sea with that pontoon. And if you are not going to solve the mystery, you don't have any case." (A34)

3. Defendant at page 15 of its brief is critical of the plaintiff for stating that the top cover of the pontoon was "only 32-hundredths of an inch thick". Defendant says it was .335 inches thick. Plaintiff obtained its figure from the finding of the Trial Judge that, "The top plate of the pontoon was of steel 32-hundredths of an inch thick" (A7).

4. Defendant, Splosna Plovba, at page 15 of its brief, states that "no request was ever made for production or the opportunity to conduct tests by plaintiff. Indeed, the matter was never raised by plaintiff until well after discovery had been completed and a note of issue attesting to

the readiness of the case for trial had been filed by plaintiff-appellant''.

In the first place, the defendants had the burden to establish the seaworthiness of the No. 6 pontoon and the broken wire, which caused the 1,000-lb. fender to slam about. It was for the defendants to decide whether they would try to prove the seaworthiness of both items by adequate scientific tests. Having chosen to have some tests made, those tests should have been made upon notice to plaintiff's attorneys—and not surreptitiously and incompletely. Furthermore, some of the wire should have been saved for the plaintiff and for the trial. As the Trial Judge said: ''I don't understand why a test had to gobble up every bit of that wire'' (A44).

In the second place, when plaintiff filed a note of issue the defendant went into Court claiming it was not ready for trial. Defendant was allowed to take the additional testimony of Regelja Svonko, the boatswain. During that deposition, plaintiff's attorney called in vain for the production of the broken wire about which Mr. Svonko had testified (Exhibit AC, page 55). A notice to produce it at the trial was also fruitless.

The Trial Judge gave the defendants' attorney his view of all this when he said:

> ''Why do you need a request? You are coming into court and you are producing evidence about wire —that is not available for anybody to look at, it is not available for anybody to take their own tests about.'' (A45)

5. Defendant, Splosna Plovba, at page 16 of its brief, claims that plaintiff ''implies that the trial judge refused to receive any evidence concerning testing of wire which secured a fender stowed aft of No. 1 hatch. This implication is inaccurate.''

Plaintiff had said, at page 24 of its initial brief that "The Trial Judge held that he was not receiving any evidence about the actual strength or weakness of the wire". There was no implication. The Trial Judge said:

> "Look, I will receive any evidence at all about the chain of possession of the wire, for whatever that is worth, but I am not receiving any evidence about the actual strength or weakness of the wire, at least any evidence put on by you in these documents." (A45, 46)

Conclusion

No effort will be made to repeat the arguments made in the "CONCLUSION" of plaintiff's initial brief.

However, plaintiff does desire to here demonstrate, step by step, a major error in the Trial Judge's opinion, which opinion was dictated at the end of the trial.

In his opinion the Trial Judge states that, on the issue of seaworthiness of the No. 6 pontoon cover he gave weight to the testimony of the Lloyd's Surveyor in Rotterdam (A11), who, by his own words, did not have the slightest idea if the pontoon covers he saw in Rotterdam were on the vessel during the subsequent voyage from Newport, Wales (A85, 86).

The Trial Judge also stated that he gave weight to the testimony of "the ship's personnel as to the soundness and seaworthiness of the No. 5 and No 6 pontoons at and before the vessel left Newport, Wales, for the voyage in question" (A11).

The ship's personnel referred to is none other than the boatswain. This is confirmed in defendant Splosna Plovba's brief, page 12. We have shown in this reply brief, at pages 4 and 5, that it was impossible for the boatswain, or anyone else, to "check whether all the hatches are

properly closed and secured" before departure (A111), for the simple reason that according to the vessel's log the hatches were not closed until more than two hours after departure from Newport, and then while the vessel was "rolling and pitching heavily" in the "rainy" weather (A123).

Accordingly, upon the issue of the seaworthiness of the No. 6 pontoon before departure, the Trial Judge relied on the testimony of a surveyor in another country, who had no idea if he had ever seen this particular, movable, interchangeable and replaceable pontoon; and also upon the testimony of a boatswain, who clearly could never have checked before departure "whether all the hatches are properly closed and secured". Understandably, the Trial Judge said there were "elements of uncertainty" in his decision (A13).

The "uncertainty" the Trial Judge felt would never have been present, if the struts, or strength members, of the No. 6 pontoon cover had been scientifically tested in New Orleans. Such a test could have answered the question of seaworthiness one way or the other. The pontoon cover was in the sole control of the defendants, and the fact that for some reason or other, they did not choose to have the obvious test made cannot be used against the plaintiff. In fact, failure to have the obvious test made raises a presumption against defendants.

Plaintiff submits that if, as we have all been taught for a long time, "the warranty of seaworthiness is a favorite of the admiralty and exceptions to it or limitations upon it, are narrowly scrutinized", *Metropolitan Coal Co.* v. *Howard,* 155 F(2d) 780, 783, then the "elements of uncertainty" in this decision will withstand little scrutiny.

WHEREFORE, the judgment dismissing the complaint of Jordan International Company *in rem* against the vessel and *in personam* against the defendants should be re-

versed, and the case remanded to the District Court to enter judgment on the merits for Jordan International Company against the vessel and the defendants, and to compute said plaintiff's damages, plus interest and costs.

Respectfully submitted,

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